Office of Administrative Law Judges

MEMORANDUMDATE: July 31, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT:DEPARTMENT OF VETERANS AFFAIRS

VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
Respondent

AND Case No. WA-CA-07-0087

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145
Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145
Charging Party

Case No. WA-CA-07-0087

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 4, 2007**, and addressed to:

Office of Case Control

Federal Labor Relations Authority

1400 K Street, NW, 2nd Floor

Washington, DC 20424-0001

PAUL B. LANG

Administrative Law Judge

Dated: July 31, 2007

OALJ 07-19

DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
RICHMOND, VIRGINIA
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145
Charging Party

Case No. WA-CA-07-0087

Shamar R. Cowan
For the General Counsel
Theodore Knicely
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

**Statement of the Case**

On November 8, 2006, the American Federation of Government Employees, Local 2145 (Union) filed an unfair labor practice charge against the Department of Veterans Affairs, Veterans Affairs Medical Center, Richmond, Virginia (Respondent) (GC Ex. 1(a)). On May 11, 2007, the Regional Director of the Washington Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by holding a formal meeting with a member of the bargaining unit repre-

sented by the Union without providing the Union with advance notice and the opportunity to have a representative in attendance. It was further alleged that the Respondent's action was in violation of §7114(a)(2)(A) of the Statute. The Respondent filed a timely Answer [1/] in which it denied the alleged violations.

A hearing was held in Richmond, Virginia on June 27, 2007. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence and of the post-hearing briefs submitted by the parties.

**Positions of the Parties**

The General Counsel maintains that, on or about November 2, 2006, the Respondent, through Charles Snow, a Labor Relations Specialist, held a formal discussion with Ronald Spencer, a member of the bargaining unit, concerning an upcoming arbitration hearing arising out of a grievance which had been filed by the Union. According to the General Counsel the purpose of the meeting was to influence Spencer's testimony at the hearing. The Respondent did not notify the Union of the meeting or provide the Union with an opportunity to have a representative attend. The General Counsel further maintains that Spencer's attendance at the meeting was mandatory and that the duration, as well as the location and all other aspects of the meeting, indicate that it was formal.

The Respondent acknowledges that the meeting in question was initiated by Snow who had requested that Spencer drop by his office at his convenience on either of two days to discuss the grievance, but maintains that Snow had no advance notice of when Spencer would arrive and that the meeting had none of the indicia of a formal discussion.

**Findings of Fact**

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute. Spencer is an employee as defined in §7103(a)(2) of the Statute. Spencer is a member of a unit of the Respondent's employees which is represented by the Union and is appropriate for collective bargaining.

Some time in 2005 Michelle Trotter, a member of the bargaining unit, submitted a claim for educational expense reimbursement under the Respondent's Education Debt Reduction Program (EDRP). Spencer, who was then the EDRP Coordinator, informed Trotter that her claim was not timely and that her job classification had not been identified as hard to fill or hard to retain and, consequently, was not covered under EDRP. Spencer's supervisor subsequently directed him to rescind the bar as to timeliness, but Spencer denied Trotter's application because of her job classification (Tr. 33, 35, 36). A grievance filed by the Union on Trotter's behalf was eventually scheduled for arbitration on November 14, 2006 [2/] (GC Ex. 3).

Snow was assigned to prepare the Respondent's case for presentation to the arbitrator. On October 30 Snow sent an e-mail message to Spencer asking him to come to his office to discuss the arbitration at his convenience either on Thursday or Friday of that week (GC Ex. 5). According to Snow, the purpose of the meeting was to determine if Spencer had any relevant documents. He asked Spencer to come to his office because Spencer was then working as a registered nurse in the emergency room and, consequently, had no office of his own. Snow further testified that Spencer's compliance with his request was voluntary (Tr. 80-82). When asked why he did not mention the documents in his e-mail message to Spencer, Snow testified that he needed to meet with Spencer because he "wanted to be sure I got results" (Tr. 84). In any event, Spencer came to Snow's office as requested, but with no advance notice as to when he would appear (Tr. 39).

Snow and Spencer expressed differing recollections of their meeting. Spencer testified that he considered his compliance with Snow's request to have been mandatory and that he had never before been called to Snow's office. According to Spencer the meeting lasted from between 30 and 40 minutes. Snow asked Spencer if he had retained any files regarding Trotter's application; he said that he had not (Tr. 60). Snow showed Spencer a copy of a letter dated August 22, 2005, from Jennifer Marshall, the Union President, to Spencer requesting reconsideration of the denial of Trotter's request (GC Ex. 2) and asked him if he had seen it before; Spencer replied that he had not. Snow asked Spencer if he was aware that Trotter's request had been referred to New Orleans where it was again denied and Spencer said that he was not. Snow did not ask him any other questions about the arbitration or the grievance. In

1. / The index to the formal documents lists the Answer as GC Ex. 1(e). However, the actual exhibit is a document entitled "Settlement Response to Complaint CA-WA-07-0087" which is, in effect, the Respondent's pre-hearing disclosure.

2. / All subsequently cited dates are in 2006 unless otherwise indicated.

fact, Spencer testified that Snow did not ask him any questions about the arbitration (Tr. 43-48).

According to Spencer, he had the impression that the purpose of the meeting was to prepare him to testify for the Respondent. Spencer further testified that Snow never mentioned the Union, but told him that he might be a witness and to remain available for the arbitration hearing (Tr. 51). [3 /]

Spencer was assigned to a midnight to 8:00 a.m. shift in the emergency room. On the morning of the arbitration hearing he continued to work until late morning. He then went to the room where the hearing was to be held and asked Snow and others if he would be needed. They told him that he would not (Tr. 52, 53).

Snow testified that the meeting with Spencer lasted about 15 minutes and was voluntary since Spencer was not in his chain of command. The Union had not yet followed the contractual procedure for identifying Spencer as a witness so that his work schedule could be adjusted, but Snow felt that Spencer probably would be called by the Union. Snow had determined that Spencer was not going to be needed as a witness for the Respondent because a management official in New Orleans had rejected Trotter's request subsequent to the initial rejection by Spencer. He told Spencer that the Respondent would not call him but that he might be called by the Union. Snow further testified that he did not ask Spencer how he would answer particular questions at the arbitration hearing. Spencer questioned him about the status of the grievance and Snow got the impression that he was annoyed at how it was being handled by both the Union and the Respondent (Tr. 70-76).

There was a degree of inconsistency in Snow's testimony. On the one hand, he stated that he needed to see Spencer so that he could determine whether there were any pertinent documents that he (Snow) had not received and whether the Medical Director had followed the proper procedure. Yet, Snow acknowledged that he did not ask Spencer to bring any documents to their meeting (Tr. 80-82).

Marshall's stated impression of what transpired at the meeting was second-hand and is somewhat at odds with the testimony of both Spencer and Snow. Marshall testified that she had received no advance notice of Spencer's meeting with Snow (this is undisputed). On November 6 Marshall asked Spencer to meet with her and, on November 8, he came to the Union office. Spencer told her that Snow had told him the questions that he would be asked at the arbitration hearing as well as the answers that he should give (Tr. 20, 21). Spencer also told her that he was unaware that he was entitled to Union representation at the meeting (Tr. 22). Marshall further testified that Spencer was included in a list of witnesses that the Union's attorney had provided to Ted Knicely, whom she identified as the head of Human Resources (Tr. 19). On cross-examination (by Knicely), Marshall acknowledged that she had not seen the list and did not know when it was submitted (Tr. 22, 23); the list was not offered in evidence.

On February 10, 2006, the Union and the Respondent entered into an agreement in settlement of a negotiability appeal that the Union had instituted with the Authority (Resp. Ex. 4). The agreement states in pertinent part:

1. Upon written notice from AFGE 2145, delivered not less than seven calendar days prior to the date of an arbitration, that the union has identified a bargaining unit employee as an arbitration witness:

> a. HRMS [the Respondent] will notify the employee's supervisor that AFGE 2145 has identified a subordinate employee as a potential union arbitration witness;
>
> b. HRMS will advise the supervisor of the date, place, and time of the arbitration;
>
> c. HRMS will advise the supervisor that the witness should be on duty time and that appropriate schedule changes should be made if necessary to make the employee available to testify; and
>
> d. HRMS will advise the supervisor that the subordinate should be allowed to participate in the arbitration.

2. On the day of the arbitration, management will make every effort to make the employee available to participate. Unforeseen medical emergencies impacting an employee's availability on the day of the arbitration will be brought to the union's attention, including a description of the emergency. The parties will discuss alternatives and the arbitrator will determine how the issue will be resolved.

Upon consideration of the evidence, I find as a fact that the meeting between Snow and Spencer lasted from between 15 and 30 minutes. Spencer's recollection of its duration seemed somewhat uncertain; he testified that it lasted, "From 8 until, I don't know, 8:30, something." Yet, he also testified that he got off of work at

3. / It is undisputed that neither party called Spencer as a witness at the arbitration hearing.

8:00 a.m. (Tr. 50). Assuming that Spencer went directly to Snow's office, it would have taken him at least five minutes. Furthermore, the testimony of both Spencer and Snow as to what transpired at the meeting suggests that the meeting was of relatively short duration.

In the absence of reliable evidence to the contrary, I find that the Union did not formally identify Spencer as a potential witness. Marshall testified that she did not see the list that the Union's attorney sent to the Respondent and the list was not produced at the hearing. Therefore, it is logical to assume that the Union's attorney had determined that he would not need Spencer's testimony. This finding is corroborated by the fact that Spencer worked his regular shift on the day of the arbitration hearing and there is no evidence that the Union had requested that his schedule be changed. This issue is not crucial since Snow acknowledged that he told Spencer that the Union might call him as a witness. Snow's supposition was not unreasonable since the contractual deadline for the identification of witnesses by the Union had not yet passed.

**Discussion and Analysis**

Section 7114(a)(2) of the Statute provides, in pertinent part, that:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment

In numerous cases, such as *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999, 1012 (1991), the Authority has held that, in order for a formal discussion to occur, there must be (1) a discussion (2) which is formal (3) between one or more representatives of the agency and one or more bargaining unit employees or their representatives (4) concerning any grievance or personnel policy or practices or other general conditions of employment.

The Respondent does not allege that the meeting failed to satisfy any of the above-stated criteria other than formality. The evidence, as described above, clearly shows that a discussion occurred between Snow, a representative of the Respondent, and Spencer, a member of the bargaining unit, concerning the grievance which the Union filed on behalf of Trotter. Therefore, the only remaining issue is whether the meeting was formal.

In *U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois*, 32 FLRA 465, 470 (1988) (*DOL*) the Authority considered the following factors in determining whether a meeting was formal: (1) whether the meeting was held by a first-level supervisor, (2) whether any other management representative attended, (3) where the meeting took place, (4) how long it lasted, (5) whether the meeting was called with advance notice or spontaneously, (6) whether there was a formal agenda, (7) whether attendance was mandatory, and (8) whether there was a formal record or transcription of attendance and comments. In order to resolve the issue of formality, I will apply the criteria set forth in *DOL*.

Whether the meeting was held by a first-level supervisor. While Snow was not Spencer's supervisor, his status as a Labor Relations Specialist clearly identified him as an influential representative of management. This factor suggests that the meeting was formal.

Whether any other management representative attended. It is undisputed that only Spencer and Snow were present. This factor lends no weight to the position of either party.

Where the meeting took place. While Spencer had never before been in Snow's office, he presumably had previously visited the Human Resources department during his 29 years of employment by the Respondent. Furthermore, Spencer had no office in the emergency room, although a conference room might have been available. Spencer testified that he felt somewhat intimidated, but that feeling appears to have been the result of the nature of the discussion, including the presentation of a letter to him from the Union (GC Ex. 2) that he had never seen before [4/], rather than its location. This factor does not, in itself, suggest that the meeting was formal.

Whether the meeting was called with advance notice or spontaneously. The meeting at issue falls somewhere between the alternatives stated in this factor. Although Snow did not specify a particular time for Spencer to come to his office, Spencer naturally felt that he was obligated to meet with Snow on either of the two specified days. Accordingly, the meeting could hardly be characterized as spontaneous. While Snow could not

4. / Spencer apparently wondered how Snow had obtained a letter that had been addressed to him. He did not notice that a copy of the letter had been addressed to Snow. It is possible that Spencer suspected the Respondent of intercepting the letter and/or the Union of failing to send it to him.

have informed Marshall of the exact time and date of the meeting, he could have informed her of his request to Spencer so that she could have contacted Spencer and arranged to be present. This factor weighs in favor of the General Counsel's position.

Whether there was a formal agenda. Contrary to the General Counsel's assertions, there is no evidence that a formal agenda was published and it has not been alleged that Snow referred to one. Snow had a specific reason for wanting to meet with Spencer, but there is often a specific reason for even the most spontaneous and informal meetings. This factor suggests that the meeting was not formal.

Whether attendance was mandatory. Although Spencer was never told that he had to comply with Snow's request, it is reasonable to assume that he felt compelled to do so. This factor supports the argument that the meeting was formal.

Whether there was a formal record or transcription of attendance and comments. Although Snow might have taken notes, there was no formal record or transcription of the meeting or comments on what had transpired. A record of attendance would have been unnecessary since there were only two participants. This factor indicates that the meeting was not formal.

The Authority has made it clear that factors other than those cited above may be taken into account and that the totality of facts and circumstances are to be considered in determining whether a meeting was formal, *DOL*, 32 FLRA at 470. The duration of the meeting indicates that, while the meeting was not casual, it was not necessarily formal. The evidence suggests that the meeting was prolonged by Spencer's questions as to the status of the grievance and by his expressions of dissatisfaction with the actions of both the Respondent and the Union. [5 /]

The meeting between Spencer and Snow falls into something of a gray area between formality and informality. Although not precisely scheduled, the meeting was not a spontaneous or a casual encounter; there can be no doubt that Spencer came to Snow's office at Snow's request and that Snow expected Spencer to arrive on one of the two days mentioned in his message. Even if the meeting was not mandatory, Snow could reasonably have foreseen that Spencer would have felt obligated to attend. In addition, Spencer would naturally have regarded Snow as a person of influence even though they were not in the same chain of command. Nevertheless, Spencer acknowledged that, contrary to the General Counsel's assertion, Snow did not subject him to intense questioning concerning the grievance or his testimony if he were called as a witness at the arbitration hearing. There was no formal agenda and neither the location nor the duration of the meeting suggest that it was formal. Therefore, upon consideration of all of the evidence, I have concluded that the General Counsel has not met her burden of proof under §2423.32 of the Rules and Regulations of the Authority that the meeting in question was formal.

For the reasons stated above I have concluded that the Respondent did not commit an unfair labor practice by failing to notify the Union of the meeting between Snow and Spencer. Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, July 31, 2007

PAUL B. LANG

Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-07-0087, were sent to the following parties:

5. / Although Spencer was a member of the bargaining unit, he was not a member of the Union (Tr. 57). This might explain why he did not consult a Union representative before going to Snow's office and why he spoke to Snow in the absence of a Union representative.